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The HongKong and Shanghai Banking Corp Ltd v The owners and/or the demise charterers of, and/or other persons interested in the ship 'Sea Coral' of the Port of Cook Islands (An Zhong Shipping Pte Ltd & Ors, interveners)

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HIGH COURT (KUALA LUMPUR) — ADMIRALTY IN REM NO WA-27NCC-39–05 OF 2020

C ATAN MUSTAFFA JC

3 AUGUST 2021

Civil Procedure — Judgment in default — Judgment in default of appearance — Application for Whether the intervener had a right to enter appearance on behalf of defendant — Whether the issue of fraudulent bill of lading jeopardised the judgment in default application — Whether the judgment in default application amounted to denial of natural justice — Rules of Court 2012 O 70 r 16(3), 20(3) O 32 r 6, O 42 r 13, O 92 r 4

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This was a plaintiff's application for judgment in default of appearance on their writ in rem filed previously to be entered against the defendant ('encl 45') to pay the plaintiff USD34,815,000 (equivalent to RM151,271,175 at rate of exchange of US$1 to RM4.345 as at 13 May 2020) due to the misdelivery of cargo for its value shipped on board the vessel based on the bill of lading. Alternatively, the plaintiff sought the defendant to pay to the plaintiff damages to be assessed in relation to the bailment, loading, stowage, handling, custody, care, discharge and delivery of the cargo as evidenced by the bill of lading from Tanjung Pelepas, Malaysia to Tanjung Pelepas, Malaysia whereby the defendants, their servants or agents, wrongfully and/or in breach of contract of carriage and/or in breach of duty and/or negligence and/or in breach of duty as bailees and/or conversion and/or wrongful delivery and/or wrongful detention and/or wrongful interference with and/or injury to the plaintiff's interest in the cargo delivered the cargo without production of the original bill of lading and/or to persons not entitled to delivery of the said cargo. The plaintiff also claimed the defendant to indemnify the plaintiff for all loss, liability, costs and/or expenses suffered and/or incurred or which may be suffered and/or incurred by the plaintiff. In encl 51, the plaintiff applied mainly for para 3 in the ex parte order dated 26 November 2020 to be set aside. The first intervener submitted that it had locus standi to defend the plaintiff's claim in the capacity of a defendant and serve its defence, plead or set up defence available to the defendant on the basis that an intervener may protect its interest in the vessel under arrest or the sale proceeds representing the vessel by defending the action either as to liability or quantum or both. Both encl 45 and encl 51 were heard

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together. Hence, the issues for determination were: (a) whether the intervener had a right to enter appearance on behalf of defendant; (b) whether the issue of fraudulent bill of lading jeopardised the judgment in default application; (c) whether the judgment in default application amounted to denial of natural justice.

Held, allowing enc 51 and encl 45 with costs:

(1) The court found that there was no dispute that defendant was the real defendant in this action as it was 'the relevant person' who would be liable to the plaintiff on the action in personam and could enter appearance as of right in the capacity of a defendant. The first intervener, who was protecting its interests in the vessel, could enter its appearance only in the capacity of an intervener. No appearance was entered by the defendant. However, the first intervener, who had entered an appearance with leave of the court in the capacity of an interevener was setting up a defence that was available to the defendant by raising the issue that the bill of lading was invalid due to forgery. This was not a defence which was available to the first intervener as the owner of the vessel but was only available to the demise charterer of the vessel. The vessel which was demise chartered to the defendant was not in possession of the first intervener at the material time and neither was the first intervener a party to the contract of carriage as evidenced by the bill of lading. The court found that the first intervener was attempting to step into the shoes of the defendant to defend the plaintiff's pleaded claim founded on the misdelivery of the cargo. The first intervener was an intervener who had no locus standi to raise issues which are not pertinent to the protection of its interest (see paras 33, 35 & 44–45).

(2) The court was of the view that the plaintiff had proven that its claim for misdelivery of cargo against the defendant and judgment in default ought to be granted to the plaintiff. However, the first intervener had raised the issue that the substratum of the plaintiff's claim, that the bill of lading was being called into serious question as the findings of the defendant's and OTPL's interim judicial managers at that time through their investigations had raised questions as to whether the plaintiff was holding a valid original bill of lading for the cargo onboard the vessel. Fabrication of the bill of lading was also an issue in Suit 805. However, the court found that there was no issue of fraud in the instant case since the plaintiff as a bank who provided the trade facility which was secured by the general pledge where the defendant had pledged to the plaintiff its interest over the bill of lading was protected from any fraudulent transaction. When a bank provides a trade facility and the customer pledges a bill of lading as security, the bank does not need to go behind the bill of lading to find out whether it was procured by the fraud of the customer. There was thus no issue of fraud in the instant case since the plaintiff as a bank who provided

the trade facility which was secured by the general pledge where the defendant had pledged to the plaintiff its interest over the bill of lading was protected from any fraudulent transaction. Therefore, the plaintiff should not be deprived of its judgment in default in its in rem action against the defendant for misdelivery of the cargo carried onboard the vessel under the bill of lading for the value of the cargo when the fabrication of the bill of lading did not come to the notice of the plaintiff when the trade facility was granted to the defendant (see paras 56 & 62).

(3) The judgment in default granted by this court did not amount to a denial of natural justice as the writ was properly issued and served. The judicial managers of the defendant had notice of the claim and instead of defending the claim opted to bring an action in Suit 805 against the directors of the defendant, were also the directors of the first intervener. There was no useful purpose in going to trial when the defendant (under judicial management) would not be contesting the plaintiff's claim. The first intervener had already been excluded from setting up a defence available to the defendant by virtue of encl 51 being allowed. The plaintiff's claim based on the evidence before the court would remain intact without challenge at the trial. In any event, the interim findings by the defendant's interim judicial managers were unconfirmed. These were not final and were subject to further investigations. Thus, they cannot be relied on (see paras 66 & 70–71).

[Bahasa Malaysia summary

Ini adalah permohonan plaintif untuk penghakiman ingkar kehadiran ke atas writ in rem yang difailkan terhadap defendan ('lampiran 45') untuk membayar plaintif USD34,815,000 (bersamaan dengan RM151,271,175 pada kadar pertukaran US$1 hingga RM4.345 pada 13 Mei 2020) atas nilai kargo yang salah dihantar berdasarkan bil muatan. Sebagai alternatif, plaintif memohon defendan membayar ganti rugi kepada plaintif nilai jaminan, pemuatan, angkutan, pengendalian, jagaan, penjagaan, pelepasan dan penghantaran kargo seperti yang dibuktikan oleh bil muatan dari Tanjung Pelepas, Malaysia ke Tanjung Pelepas, Malaysia di mana defendan, kakitangan atau ejen mereka, secara salah dan/atau melanggar kontrak pengangkutan dan/atau melanggar kewajipan dan/atau kecuaian dan/atau melanggar tugas sebagai penjamin dan/atau penukaran dan/atau penghantaran yang salah dan/atau penahanan yang salah dan/atau gangguan yang salah terhadap dan/atau kerugian kepada kepentingan plaintif di dalam kargo yang dihantar kargo tanpa bil pengeluaran bil muatan asal dan/atau kepada orang yang tidak berhak untuk kargo tersebut. Plaintif juga menuntut defendan membayar ganti rugi kepada plaintif untuk semua kerugian, liabiliti, kos dan/atau perbelanjaan yang dialami dan/atau ditanggung atau yang mungkin dialami dan/atau ditanggung oleh plaintif. Pada 26 November 2020, plaintif memohon supaya perenggan 3 dalam perintah ex parte bertarikh 26 November 2020 diketepikan. Pencelah

menghujahkan bahawa mereka mempunyai locus standi untuk mempertahankan tuntutan plaintif di dalam kapasiti defendan dan memasukkan pembelaannya, atas dasar bahawa pencelah boleh melindungi kepentingannya di dalam kapal yang ditahan atau hasil penjualan kapal tersebut dengan mempertahankan tindakan sama ada mengenai liabiliti atau kuantum atau kedua-duanya. Kedua-duanya lampiran 45 dan lampiran 51 didengar bersama. Oleh itu, isu-isu penentuan adalah: (a) sama ada pencelah mempunyai hak untuk memasuki pembelaan bagi pihak defendan; (b) sama ada isu bil muatan menjejaskan penghakiman dalam permohonan penghakiman ingkar; (c) sama ada permohonan penghakiman ingkar adalah penafian keadilan semula jadi.

Diputuskan, membenarkan lampiran 51 dan 45 dengan kos:

(1) Mahkamah ini mendapati bahawa tiada pertikaian bahawa defendan adalah defendan sebenar dalam tindakan ini kerana ia adalah 'orang yang relevan' yang akan bertanggungjawab kepada plaintif atas tindakan secara peribadi dan boleh memasuki kehadiran dalam kapasiti defendan. Pencelah pertama, yang melindungi kepentingannya dalam kapal, boleh memasuki kehadirannya hanya dalam kapasiti pencelah. Tiada kehadiran yang dimasuki oleh defendan. Walau bagaimanapun, pencelah pertama, yang telah memasuki kehadiran dengan kebenaran mahkamah sebagai kapasiti seorang pencelah telah membangkitkan pembelaan untuk defendan dengan membangkitkan isu bahawa bil muatan adalah tidak sah kerana dipalsukan. Hal ini bukan satu pembelaan untuk pencelah pertama sebagai pemilik kapal namun sesuai untuk pemilik kapal. Kapal yang telah diserahkan kepada defendan tidak dimiliki oleh pencelah pada pertama masa material dan bil muatan juga tidak dimasuki oleh pencelah pertama. Mahkamah ini mendapati bahawa pencelah pertama cuba mengambil kapasiti defendan untuk mempertahankan tuntutan yang dituntut oleh plaintif atas kargo yang disalah hantar. Pencelah pertama tidak mempunyai locus standi untuk membangkitkan isu-isu yang tidak berkaitan dengan perlindungan kepentingannya (lihat perenggan 33, 35 & 44–45).

(2) Mahkamah ini berpendapat bahawa plaintif telah berjaya membuktikan bahawa tuntutannya untuk kargo yang disalah hantar terhadap defendan dan penghakiman ingkar harus diberikan kepada plaintif. Walau bagaimanapun, pencelah pertama telah membangkitkan isu bahawa bahawa bil muatan telah dipalsukan berdasarkan dapatan defendan dan Pengurus Kehakiman Interim OTPL. Hal ini menimbulkan persoalan bahawa plaintif merupakan pemilik bil muatan yang sah atas kapal tersebut. Isu pemalsuan bil muatan ini juga merupakan isu di dalam Guaman 805. Walau bagaimanapun, mahkamah mendapati bahawa tiada isu penipuan di dalam kes ini kerana plaintif sebagai bank yang menyediakan kemudahan perdagangan yang telah dijamin secara am di

mana defendan telah berjanji kepada plaintif mengenai kepentingannya terhadap bil muatan dari sebarang transaksi penipuan. Apabila bank menyediakan kemudahan perdagangan dan pelanggan menjanjikan bil muatan sebagai cagaran, bank tidak perlu lagi bergantung kepada bil muatan untuk mengetahui sama ada ianya diperolehi secara frod. Oleh itu, tiada isu penipuan di dalam kes ini. Oleh itu, plaintif tidak boleh dinafikan haknya untuk memasukkan penghakiman ingkarnya di dalam writ in rem terhadap defendan kerana kargo yang disalah hantar tertakluk kepada bil muatan dan isu bil muatan yang dipalsukan tidak diketahui oleh plaintif ketika kemudahan perdagangan diberikan kepada defendan (lihat perenggan 56 & 62)

(3) Penghakiman ingkar yang diberikan oleh mahkamah ini bukanlah merupakan penafian keadilan semula jadi kerana writ tersebut telah dikeluarkan dan disampaikan dengan sempurna. Pengurus kehakiman defendan telah menerima notis tuntutan tersebut dan memfailkan Guaman 805 terhadap para pengarah defendan. Mereka juga merupakan pengarah campur pencelah pertama. Perkara ini tidak sesuai untuk ke perbicaraan penuh apabila defendan (di bawah pengurusan kehakiman) tidak akan mempertahankan tuntutan plaintif. Pencelah pertama telah dikecualikan daripada membangkitkan pembelaan yang untuk defendan berdasarkan lampiran 51 yang dibenarkan. Tuntutan plaintif adalah berdasarkan keteranga yang dikemukakan di mahkamah tanpa perlu ke perbicaraan penuh. Walaubagaimanapun, penemuan awal oleh pengurus kehakiman interim defendan tidak disahkan. Hal ini tidak muktamad dan tertakluk kepada siasatan lanjut. Oleh itu, mahkamah ini tidak boleh bergantung kepada keadaan ini (lihat perenggan 66 & 70–71).]

Cases referred to

Barclays Bank Ltd v Commissioners of Customs and Excise [1963] Lloyd's Rep 81, QBD (refd)

Czarnikow-Rionda Sugar Trading Inc v Standard Bank London Ltd and others [1999] 1 All ER (Comm) 890, QBD (refd)

Emmanuel E Okwuosa & Ors v Owners of the ship and other persons interested in the ship MV Brihope (Hong Leong Leasing Sdn Bhd, interveners) [1995] 1 MLJ 676, HC (refd)

Kuwait Petroleum Corporation v I & D Oil Carriers Ltd (The Houda) [1994] 2 Lloyd's Rep 541, CA (refd)

The Lord Strathcona [1925] P 143 (refd)

Mewah-Oils Sdn Bhd v Lushing Traders Pte Ltd [2017] 2 MLJ 592, CA (refd)

Minmetals South-East Asia Corp Pte Ltd v Nakhoda Logistics Sdn Bhd [2018] 6 MLJ 152, CA (refd)

Mohd Syamsul bin Md Yusof & Ors v Elias bin Idris [2019] 4 MLJ 788, FC (refd)

Ng Ben Thong & Ors v Krishnan a/l Arumugam [1998] 5 MLJ 579, HC (refd)

PT Karya Sumiden Indonesia v Oceanmasters Marine Services Sdn Bhd & Anor [2016] 7 MLJ 589, HC (refd)
Pemunya Kapal MV Brihope & Ors v Emmanuel E Okwuosa & Ors [1997] 1 MLJ 453, CA (refd)
Qatar National Bank v Owner of the Yacht Force India [2020] 2 Lloyds Rep 343 (refd)
Sucre Export SA v Northern Shipping Ltd, The Sormovskiy 3068 [1994] 2 Lloyd's Rep 266, QBD (refd)
Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd [1959] 1 MLJ 200, PC (refd)
The Bolbina [1994] 1 SLR 554; [1993] 3 SLR(R) 894, HC (refd)
The Fordeco Nos 12 and 17; the owners of and all other persons interested in the Ships Fordeco No 12 and Fordeco No 17 v Shanghai Hai Xing Shipping Co Ltd, the owners of the ship MV Xin Hua 10 [2000] 1 MLJ 449, FC (refd)
The 'Salina' [1998] 3 SLR 76; [1998] SGHC 76, HC (refd)
The 'Byzantion' (1922) 12 Ll L Rep 9 (refd)
The 'Eternal Peace' [1985] 1 Lloyd's Rep 136 (refd)
'The Soeraya Emas' Aseamlease Bhd v Owners of and other persons interested in the ship or vessel 'Soeraya Emas' [1992] 1 SLR 33, HC (refd)
Turkiye Is Bankasi AS v Bank of China [1992] 2 Lloyd's Rep 211
Wei Hsing Food (S) Pte Ltd v The owners or demise charterers of the ship or vessel 'The Neptune' and another action [2005] 5 MLJ 702, HC (refd)

Legislation referred to

Civil Law Act 1956 s 11
Companies Act [SG] ss 211B, 227B
O 70 r 16(3) ROC 2012
Rules of Court 2012 O 12 rr 1, 2, 3, 4, O 15 r 6(2)(b)(ii), O 32 r 6, O 42 rr 12, 13, O 70 r 16, 16(3), 16(4), O 70 r 20(3), O 92 r 4

Rajasingam Gothandapani (Nik Azila Shuhada bt Nik Abdullah and Koay Qiu Yin with him) (Shearne Delamore & Co) for the plaintiff.
Jeremy Mark Joseph (Joseph & Partners) for the first intervener.

Atan Mustaffa JC:

[1] This judgment concerns the plaintiff's application (encl 45) against the defendant pursuant to O 70 r 20(3) of the Rules of Court 2012 ('the ROC 2012') to enter a judgment in default of appearance and the plaintiff's application (encl 51) pursuant to O 32 r 6, O 42 r 13 and/or O 92 r 4 of the ROC 2012 to set aside an order that the first intervener be granted leave to serve a defence and/or plead and/or set up any and all defences available to the defendant.

[2] I heard both applications together and after reserving my decisions, I decided as follows:

A (a) encl 45 was allowed with costs to the plaintiff in the sum of RM7,000 to be paid by the first intervener; and

(b) encl 51 was allowed with costs to the plaintiff in the sum of RM7,000 to be paid by the first intervener.

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[3] This judgment contains the full grounds for my decisions.

BACKGROUND FACTS

C **[4]** In May 20212, the plaintiff, a Singapore bank, provided the defendant, a Singapore registered company in the business of oil trading, with a trade facility, consisting of documentary credit lines and standby letter of credit lines ('the trade facility') to finance the defendant's purchase of oil and oil-related products. The trade facility was documented primarily by the plaintiff's letter D of offer to the defendant dated 31 May 2012 ('the letter of offer') which sets out the terms of the trade facility. The acceptance of the letter of offer was signed by directors of the defendant, Lim Chee Meng and Lim Huey Ching who are also shareholders of the defendant.

E **[5]** The trade facility was secured by a general pledge ('the general pledge') by the defendant to the plaintiff dated 4 June 2012, pledging the defendant's interest over six original Bills of Lading, representing the cargo aboard four ships, 'Chang Bai San', 'Wu Yi San', 'Sea Coral' and 'Sea Latitude'. The general pledge was signed by Lim Chee Meng and Lim Huey Ching. Pursuant to the F general pledge, the plaintiff held and have been in possession of bill of lading NO OTK20-808 dated 16 March 2020 ('the bill of lading') and the plaintiff became the owners of 161,089.107 metric tons of Low Sulphur Fuel Oil ('the cargo') shipped on board the 'Sea Coral' of the Port of Cook Islands ('the vessel') as evidenced by the bill of lading. The named shipper under the bill of G lading is the defendant. While the defendant was the demise charterer of the vessel, the owner of the vessel is the first intervener, An Zhong Shipping Pte Ltd, a Singapore registered company who share common directors and shareholders (Lim Chee Meng and Lim Huey Ching) with the defendant. The plaintiff has not parted with possession or delivered the bill of lading to third H parties.

[6] The defendant defaulted on the trade facility and the plaintiff exercised its pledge over the six original Bills of Lading. As a first step, the plaintiff issued a letter dated 11 April 2020 to the owner of the vessel, the first intervener, to I notify it that the plaintiff held the original Bills of Lading and its interest in the cargo. This letter was copied to the commercial managers of the vessel, Ocean Tankers Pte Ltd ('OTPL'), a Singapore registered company who also share common directors and shareholders (also Lim Chee Meng and Lim Huey Ching) with the defendant. In the same letter, the plaintiff also informed the

first intervener and OTPL not to release the cargo to anyone without production of the original Bills of Lading. The plaintiff did not receive any response to the plaintiff's letter dated 11 April 2020 and the plaintiff sent a follow up letter dated 21 April 2020 and informed of the same.

[7] The plaintiff discovered subsequently through affidavits filed by the defendant and OTPL in separate proceedings in Singapore under ss 211B and 227B of the Companies Act of Singapore, the cargo under the bill of lading has been discharged from the vessel. As the first intervener, OTPL and the defendant did not confirm that the amount of cargo stated in the bill of lading was still on board the vessel, the plaintiff deemed that the cargo under the bill of lading has been misdelivered.

[8] Subsequently, the defendant and OTPL were placed under judicial management pursuant to applications by the defendant and OTPL in the Singapore High Court dated 21 April 2020 and 6 May 2020 respectively. PricewaterhouseCoopers Advisory Services Pte Ltd ('PWC') was appointed as the interim judicial managers of the defendant by an order of Singapore High Court dated 27 April 2020. Ernst & Young LLP ('EY') was appointed as the interim judicial managers of OTPL by an order of Singapore High Court dated 12 May 2020. PWC and EY up until their appointments as judicial managers are referred together as 'the interim judicial managers'.

[9] On 13 May 2020 the plaintiff filed a writ in rem on 13 May 2020 on an in rem action against the defendant for misdelivery of the cargo carried onboard the vessel under the bill of lading for USD34,815,000, equivalent to the value of the cargo and/or alternatively, damages, together with indemnity, interest, and costs.

[10] The interim judicial managers of the defendant and OTPL issued interim judicial managers' reports on 22 June 2020 and 7 July 2020 respectively. The report by the defendant's interim judicial manager stated that 22 bills of lading under investigation which includes the bill of lading, were not signed by the master and/or operators of the relevant vessels. Quite similarly, the OTPL interim judicial manager's report stated that 22 bills of lading under investigation which includes the bill of lading, were not signed by the master and/or operators of the relevant vessels and/or were not prepared and/or signed by the relevant department of OTPL which prepared, and signed bills of lading in the usual course of business.

[11] On 7 August 2020, both the defendant and OTPL were placed under judicial management under the orders of the Singapore High Court. PWC and EY after 7 August 2020 are referred together as 'the judicial managers'.

A **[12]** The defendant (under judicial management) commenced an action against the defendant's directors in in the High Court of Singapore Suit No High Court/S 805/2020 ('Suit 805') and on 28 August 2020, served its statement of claim asserting, inter alia, that the directors caused the defendant to obtain inventory financing improperly from various banks (including the B plaintiff) by pledging cargo it did not own, overstating the quantity of cargo it did not own and pledging cargo which had already been encumbered.

[13] On 8 November 2020, the plaintiff obtained a warrant of arrest to arrest the vessel. The writ in rem and warrant of arrest were duly served on the vessel C on 8 November 2020 as notice to all persons interested in the vessel. The 14 days to enter appearance lapsed but the defendant did not enter an appearance, and a certificate of non-appearance was filed on 24 November 2020.

D **[14]** On 26 November 2020 the first intervener, by way of an ex parte application, obtained leave to intervene and plead the defences available to the defendant and entered an appearance on 27 November 2020 ('the ex parte order'). Specifically para 3 of the ex parte order reads, 'The Intervener be granted leave to serve a Defence and/or plead and/or set up any and all defences E available to the defendant, within twenty one (21) days from the date appearance is entered (or within such other period that the Court may direct)'. The grounds relied on by the first intervener to support the application for leave to intervene was the first intervener, as the registered owner of the vessel, has a direct interest in the vessel, and this interest would be injuriously affected by the arrest and any sale of the vessel.

F **[15]** The plaintiff filed an application for judgment in default of appearance in encl 45 on 17 December 2020. On 22 December 2020 the plaintiff filed an application in encl 51 to set aside para 3 of the first intervener's ex parte order dated 26 November 2020.

G **[16]** On 29 December 2020 the plaintiff applied for an order for sale pendente lite of the vessel an order for sale pendente lite was granted on an expedited basis on 22 January 2021 to preserve the value of the security.

H **[17]** On 30 December 2020, ICICI Bank Ltd as mortgagees of the vessel intervened as second intervener in the action.

[18] The first intervener served its defence on 13 January 2021.

I **[19]** On 26 January 2021, Gard Bermuda P&I, the protection and indemnity (P&I) insurers of the vessel intervened as third intervener in the action. On 17 February 2021, the third intervener obtained leave of court to pay the crew wages and repatriation expenses of the 25 crew onboard the vessel,

and these expenses incurred post-arrest to be treated as Sheriff's costs and expenses and paid out of the proceeds of the sale of the vessel. Also, by a solicitors agreement, the plaintiff, the second intervener and third intervener for the third intervener to take over conduct of the sale of the vessel.

[20] On 24 February 2021, the plaintiff served its reply to the first intervener's defence.

THE APPLICATIONS

[21] In encl 45, the plaintiff applied for judgment in default of appearance to be entered against the defendant, mainly, on the following terms:

(a) the defendant to pay the plaintiff USD34,815,000 (equivalent to RM151,271,175 at rate of exchange of US$1 to RM4.345 as at 13 May 2020) ie the value of the cargo shipped on board the vessel as evidenced by the bill of lading;

(b) alternatively, the defendant to pay to the plaintiff damages to be assessed in relation to the bailment, loading, stowage, handling, custody, care, discharge and delivery of the cargo as evidenced by the bill of lading from Tanjung Pelepas, Malaysia to Tanjung Pelepas, Malaysia whereby the defendants, their servants or agents, wrongfully and/or in breach of contract of carriage and/or in breach of duty and/or negligence and/or in breach of duty as bailees and/or conversion and/or wrongful delivery and/or wrongful detention and/or wrongful interference with and/or injury to the plaintiff's interest in the cargo delivered the cargo without production of the original bill of lading and/or to persons not entitled to delivery of the said cargo;

(c) the defendant to indemnify the plaintiff for all loss, liability, costs and/or expenses suffered and/or incurred or which may be suffered and/or incurred by the plaintiff;

(d) the defendant to pay to the plaintiff pre-judgment interest on all sums adjudged to be due to the plaintiff at the rate of 5%pa from 12 June 2020 to the date of judgment pursuant to s 11 of the Civil Law Act 1956;

(e) the defendant to pay to the plaintiff post-judgment interest on all sums adjudged to be due to the plaintiff at the rate of 5%pa pursuant to O 42 r 12 Rules of Court 2012 from the date of judgment until the date of full satisfaction; and

(f) the defendant to pay the plaintiff RM1,500 as costs.

[22] In encl 51, the plaintiff applied mainly for para 3 in the ex parte order dated 26 November 2020 to be set aside.

[23] Both encl 45 and encl 51 were heard together. However, as encl 51 dealt with the more fundamental issue of the rights of the first intervener to plead the defences available to the defendant and a decision on encl 51 will have a bearing on encl 45, I considered encl 51 first.

ANALYSIS AND FINDINGS OF THE COURT

Enclosure 51

[24] The ground that the plaintiff put forward for encl 51 is that the first intervener, as the owner of the vessel, only has an interest in the vessel and is not the party that is liable in personam for the plaintiff's claim. The first intervener is not a party to the bill of lading or in the transaction between the plaintiff and the defendant who is the demise charterer of the vessel. The party that is responsible and answerable to the plaintiff's claim is the defendant who is the demise charterer of the vessel.

[25] The plaintiff submitted that given the nature of the plaintiff's claim which is a claim for misdelivery of the cargo under the bill of lading, it is not open for the first intervener as the owner of the vessel to step into into the shoes of the defendant and defend the claim on behalf of the defendant when it is only an intervener. Premised on this, only the real defendant to the plaintiff's claim can enter an appearance as of right and deliver a defence to the plaintiff's claim for misdelivery. In support of this proposition, the plaintiff relied on the decision in *The Bolbina* [1994] 1 SLR 554; [1993] 3 SLR(R) 894 and *Pemunya Kapal MV Brihope & Ors v Emmanuel E Okwuosa & Ors* [1997] 1 MLJ 453 (CA).

[26] The plaintiff submitted that an appearance entered by an intervener as a person having interest in a ship is distinct from an appearance entered by the actual defendant who would be liable on the plaintiff's claim. Here, the defendant as the proper defendant can enter appearance as of right and contest the plaintiff's claim in the capacity of a defendant as it was the demise charterer and the person in possession and in control of the vessel when the plaintiff's cause of action arose and was also the demise charterer at the time when the plaintiff's claim was filed. Although the first intervener can add itself as an intervener in this proceedings to protect its interest in the vessel it is not entitled to leave to deliver a defence to the plaintiff's claim and attempt to serve its defence, plead or set up any and all defences available to the proper defendant. Thus, the first intervener lacks the locus standi to file a defence to contest the plaintiff's claim as if it was the real defendant who is liable to the

plaintiff's claim. The plaintiff referred me to the *The Lord Strathcona* [1925] P 143 in support of this submission. A

[27] The first intervener submitted that it has locus standi to defend the plaintiff's claim in the capacity of a defendant and serve its defence, plead or set up defence available to the defendant on the basis that an intervener may protect its interest in the vessel under arrest or the sale proceeds representing the vessel by defending the action either as to liability or quantum or both. The first intervener relied on the provision of O 70 r 16(3) of the ROC 2012 which states that a person to whom leave is granted to intervene in an action shall become a party to the action and shall enter an appearance 'as if he were a defendant named in the writ'. Order 70 r 16(4) Rules of Court 2012 further states that the court has the discretion to grant leave to a person to intervene and serve on every other party such pleading as may be so specified. The first intervener also relied on *The 'Byzantion'* (1922) 12 Ll L Rep 9, *Pemunya Kapal MV Brihope* and *'The Soeraya Emas' Aseamlease Bhd v Owners of and other persons interested in the ship or vessel 'Soeraya Emas'* [1992] 1 SLR 33 to support this submission. B C D

[28] The first intervener further contended that its direct interest as the registered owner of the vessel would be adversely affected when the sums remaining after the proceeds of the sale of the vessel are utilised to pay the various legitimate maritime claimants in the usual order of priorities. This includes the claim of second intervener and other claims which include the first intervener's claims against the defendant arising under the charterparties with the defendant, inter alia, for paid insurance premiums and indemnities, outstanding charter hire, and all loss, damage and expenses incurred because of the defendant's allowing the vessel to be arrested. E F

[29] The first intervener brought the court's attention to the ongoing proceedings in the Singapore High Court in Suit 805. There, the defendant's judicial manager claims that the defendant did not authorise the issuance of the bill of lading and that it is invalid or fabricated. Thus the first intervener submitted that it is entitled to question whether the plaintiff's real cause of action lies under its rights under the security documents, and accordingly, challenge the plaintiff's right in rem against the vessel, which are questions on a defence that the defendant (under judicial management) would have set up had it appeared in this action. G H

[30] Still on Suit 805, the first intervener's counsel told the court that the issue of fraud is material and relevant evidence that must be brought to the attention of this court as a matter of justice by raising defences on behalf of the defendant (under judicial management) as the resultant findings are directly relevant to the plaintiff's claim for misdelivery of cargo for the court's I

consideration of whether the plaintiff has succeeded in proving a well-founded case and is entitled to default judgment on its claim. These are questions which the defendant would have asked and the first intervener is now asking these questions on the defendant's behalf.

[31] Premised on the above the first intervener submitted that it is entitled to defend the action, for the benefit of all maritime claimants, by:

(a) ensuring that the plaintiff proves a well-founded in rem claim before any judgment may be entered;

(b) ensuring that the plaintiff is not allowed to abuse the court process to enter judgment on its claim against the defendant when in Suit 805 in Singapore the defendant's judicial manager claims that the defendant did not authorise the issuance of the bill of lading and that it is invalid or fabricated;

(c) challenging the bona fides of the plaintiff's application for default judgment since it founds its claim in these in rem proceedings on the very same bill of lading that is pleaded in Suit 805 in the Singapore proceedings to be fabricated in whole or part; and

(d) challenging the validity and enforceability of the bill of lading, which evidences the alleged contract of carriage on which the plaintiff asserts its claim.

[32] In starting my analysis, it would be useful to consider the difference between an appearance that is entered by a defendant to a plaintiff's claim and an appearance entered by an intervener in an admiralty action. The distinction was explained clearly in *Wei Hsing Food (S) Pte Ltd v The owners or demise charterers of the ship or vessel 'The Neptune' and another action* [2005] 5 MLJ 702. Vincent Ng J (as His Lordship then was) stated:

> [22] ... Only that particular person, who is the 'relevant person', fulfilling either of the two criteria stipulated by s 21(4) SC/A, can become the proper defendant to the suit. This is 'the relevant person' who would be liable to the plaintiff on the action in personam, that is, suffer personal liability in the event the plaintiff succeeds in proving his claim. Thus, only the 'relevant person' could enter appearance as of right, conditional or otherwise, in the capacity of a defendant.
>
> [23] All other persons who do not fall within this category but otherwise have in some way an interest in the vessel, such as mortgagees, previous or subsequent owners, charterers, suppliers, repairers, belong to a separate class of persons which I shall call 'interested parties'. For this class of persons, RHC provides a special procedure under O 70 r 16 for them to intervene in the action and thereafter protect their interests in the vessel in the capacity of interveners.

[33] There is no dispute that defendant is the real defendant in this action as it is 'the relevant person' who would be liable to the plaintiff on the action in personam and could enter appearance as of right in the capacity of a defendant. The first intervener, who is protecting its interests in the vessel, can enter its appearance only in the capacity of an intervener. No appearance is entered by the defendant. However, the first intervener, who has entered an appearance with leave of the court in the capacity of an interevener is setting up a defence that is available to the defendant by raising the issue that the bill of lading was invalid due to forgery. This is not a defence which is available to the first intervener as the owner of the vessel but is only available to the demise charterer of the vessel. The vessel which was demise chartered to the defendant was not in possession of the first intervener at the material time and neither was the first intervener a party to the contract of carriage as evidenced by the bill of lading. In other words, the first intervener is attempting to step into the shoes of the defendant to defend the plaintiff's pleaded claim founded on the misdelivery of the cargo.

[34] First, the first intervener relied on the provision of O 70 r 16(3) ROC 2012 to justify that once it has been given leave to enter an appearance, it would be entitled to plead or set up any defence available to the defendant. This appears to be founded on the words 'as if he were a defendant named in the writ' that appears in para 3 of r 16. The full provision of O 70 r 16(3) is reproduced as below:

> A person to whom leave is granted to intervene in an action shall thereupon become a party to the action and shall enter an appearance therein in the Registry within the period specified in the order granting leave; and Order 12, rules 1 to 4 shall, with the necessary modifications, apply in relation to the entry of appearance by an intervener as if he were a defendant named in the writ.

[35] The plaintiff says, and I agree, that O 70 r 16(3), which refers to O 12 r 1 to r 4 which deals with mode and time for entering appearance, only explains that the time limited for a defendant to enter an appearance would apply equally in the case where the intervener seeks to enter an appearance under r 16(1). Order 70 r 16 of the Rules of Court 2012 does not entitle the first intervener, as a matter of right to deliver a defence to the plaintiff's claim as if it is the real defendant. Caselaw on this point needs to be examined to see whether there is support for the position taken by the first intervener.

[36] A case which addresses the issue of the locus standi of an intervener to raise issues available to the real defendant which are unconnected with the protection of the intervener's interest is *The Lord Strathcona*, referred to me by the plaintiff. Here, the plaintiffs who were the mortgagees of a vessel sued the mortgagors who were the owner of the vessel and sought a judgment for the validity of the mortgages and an order for the sale of the vessel by the marshal.

The charterers intervened and disputed the validity of the mortgages on the ground that the former owners of the vessel was never properly constituted according to the laws of Canada, and therefore all the subsequent transfers, bills of sale and mortgages were void. G Hill J in giving judgment stated that an intervener has no locus standi to raise issues which are not pertinent to the protection of his interest. The charterers' interest was confined only to contractual rights in the charterparty and whether such rights had been interfered with by the mortgagees of the ship. Thus, the charterers could not dispute the validity of the mortgage. G Hill J stated:

> What right have the interveners to raise this contention at all in this action? The interveners have a contractual right and nothing more. I cannot see what locus standi they have to dispute the validity of the plaintiffs' mortgages ... As to the second contention, while it is clear that the interveners cannot, as against the plaintiffs, dispute the judgment which pronounced for the validity of the mortgages and condemned the ship, they are entitled to be heard when they allege that, by reason of their contractual right, the plaintiffs ought to be restrained from exercising their own rights as mortgagees in such a way as to interfere with the contractual right of the interveners; and the question is whether the interveners are entitled at all, or on the facts of this case, to limit the plaintiffs' right to procure a sale by the court. They cannot question the judgment in rem. Can they interfere with the plaintiffs' right to obtain execution of that judgment by appraisement and sale?

[37] In *Emmanuel E Okwuosa & Ors v Owners of the ship and other persons interested in the ship MV Brihope (Hong Leong Leasing Sdn Bhd, interveners)* [1995] 1 MLJ 676 (HC), the plaintiffs applied for the determination of the priority of payments in respect of the proceeds of the sale of a vessel. The plaintiffs were the master and crew of the vessel who had obtained the order for the sale of the vessel following the defendants' failure to pay their wages. The interveners were the mortgagees of the vessel which was the security for two loans advanced to the defendants. The interveners disputed the quantum payable to the plaintiffs. The High Court held that the interveners were mortgagees and not the employers of the plaintiffs with no privity to the terms and conditions of employment. As such, they did not have the locus standi to raise the issue on the plaintiffs' salary claims. Vincent Ng J (as he then was) said this:

> Furthermore, because they are mortgagees and not employers of the plaintiffs, with privy to the terms and conditions of employment, I am not satisfied as to the locus standi of the interveners to raise this issue on the plaintiffs' salary claims.

[38] His Lordship went on to cite the passage from *Lord Strathcona* above.

[39] The High Court decision in *The Brihope* was affirmed on appeal by the Court of Appeal which was reported in *Pemunya Kapal MV Brihope & Ors v Emmanuel E Okwuosa & Ors* [1997] 1 MLJ 453. At the Court of Appeal,

Mahadev Shankar JCA (as he then was) considered again the passage from *Lord Strathcona* and said the following:

> As we understand this decision, the issue of the validity of mortgages was not one the charterers could raise afresh because it was res inter alios acta. Thus, even though it was a default judgment, the interveners could not set it aside. Since it was a judgment in rem, the charterers could not question it either ...

[40] 'Res inter alios acta' in more familiar English means 'a thing done between others does not harm or benefit others' — a contract cannot adversely affect the rights of one who is not a party to the contract. This reinforces the position that the intervener who does not have the locus standi to raise issues available to the real defendant which are unconnected with the protection of the intervener's interest cannot step into the shoes of that defendant to defend the plaintiff's pleaded claim by delivering a defence to the plaintiff's claim as if it is the real defendant.

[41] The first intervener referred the court to *The 'Byzantion'* and *The 'Soeraya Emas'* to support its position that it can set up defences the defendant could set up. It was stated by Hill J in *The 'Byzantion'*:

> ... where an intervener defends ... he defends an action against the owner. The questions on such a defence, are is the owner liable to the plaintiff, and has the plaintiff a right in rem against that ship? It follows that an intervener cannot set up defences unless they are defences which the owner could set up.

[42] *The 'Byzantion'* was followed in the Singapore decision of *The 'Soeraya Emas'* where the interveners successfully challenged the mortgagees' claim.

[43] Of particular note is that in *The 'Byzantion'* and *The 'Soeraya Emas'* the claims which the interveners sought to defend rank higher in priority to the interveners' own claim. In *The 'Soeraya Emas',* Karthigesu J said this:

> At this stage I need only to be satisfied that the contentions of Inter Maritime have merit. I am so satisfied. Thus, in my view, they have locus standi in these proceedings, for if they succeed in their defences of challenging the validity of the mortgage, their claim will not rank after the plaintiffs' claim with the result that they have a greater certainty of having their claim met in full out of the proceeds of sale provided of course they can prove their claim, and not have to make do with what is left after the plaintiffs have their claim paid in full and rank pari passu with the other claimants having the same priority as them.

[44] Thus, in *The 'Soeraya Emas'* and *The 'Byzantion',* the interveners who were seeking to defend the mortgagee's claim, which if allowed, will outrank their claim on the list of priorities of claim in an in rem action and thus have locus standi. However, the first intervener here is an intervener who has no

locus standi to raise issues which are not pertinent to the protection of its interest as explained in *The Lord Strathcona*. It cannot be said that the plaintiff's claim if allowed will outrank the first intervener's claim on the list of priorities of claim in an in rem action. Counsel for the first intervener states in his submission that 'The proceeds of the sale of the vessel will pay the various legitimate maritime claimants in the usual order of priorities, and any sums remaining will be returned to the first intervener'. The first intervener is not a maritime claimant here but is only interested in the sums remaining in the proceeds of sale after these have been paid out to the plaintiff, the second intervener and the third intervener. There is no question of the first intervener's claim outranking the plaintiff's claim to give them the locus standi to defend the plaintiff's action.

[45] As for the argument taken by the first intervener that it is entitled to defend the action for the benefit of all maritime claimants, I have already found that as the first intervener does not have the locus standi to defend the plaintiff's action in any circumstances, applying *The 'Byzantion'* and *The 'Brihope'*. The first intervener's argument here is thus untenable.

Enclosure 45

[46] The plaintiff's application for a judgment in default of appearance is made pursuant to O 70 r 20(3) of the ROC 2012 which provides as follows:

> Where a defendant to an action in rem fails to enter an appearance within the time limited for appearing, then, on the expiration of fourteen days after service of the writ and upon filing an affidavit proving due service of the writ, an affidavit verifying the facts on which the action is based and, if a statement of claim was not endorsed on the writ, a copy of the statement of claim, the plaintiff may apply to the Court for judgment by default. Where the writ is deemed to have been duty served on the defendant by virtue of Order 10, rule 1(2), or was served on the Registrar under rule 7 of this Order, an affidavit proving due service of the writ need not be filed under this paragraph, but the writ endorsed as mentioned in rule 1(2) or endorsed by the Registrar with a statement that he accepts service of the writ shall be lodged with the affidavit verifying the facts on which the action is based.

[47] The plaintiff contended that it has satisfied all the requirements stated in O 70 r 20(3) of the ROC 2012 as the defendant failed to enter an appearance 14 days after service of the writ on the vessel and the plaintiff has filed its affidavit proving due service of the writ and its statement of claim. The plaintiff also says that it has satisfied the requirement of having a well-founded case as laid out by the Federal Court in *The Fordeco Nos 12 and 17; the owners of and all other persons interested in the Ships Fordeco No 12 and Fordeco No 17 v Shanghai Hai Xing Shipping Co Ltd, the owners of the ship MV Xin Hua 10* [2000] 1 MLJ 449.

[48] The plaintiff says that it has a well-founded case which entitles it to a judgment default as it has a valid cause of action of misdelivery of cargo against the defendant. According to the plaintiff, the defendant is liable for misdelivery of the cargo shipped on board the vessel as the defendant had discharged the cargo to third parties without presentation of the original bill of lading and failed to deliver the cargo to the plaintiff who is the lawful holder of the bill of lading. The defendant had thereby breached its obligations under the contract of carriage as evidenced by the bill of lading and the plaintiff's rights, title over and interest the cargo has been impaired and a valid cause of action arises.

[49] The plaintiff relied on the 'presentation rule' in relation to the presentation of bills of lading to receive cargo: a bill of lading functions not only as a document of title entitling the holder of immediate right to the cargo but also as a contract of carriage for the delivery of the cargo shipped thereunder. The plaintiff referred the court to *Mewah-Oils Sdn Bhd v Lushing Traders Pte Ltd* [2017] 2 MLJ 592 (CA) and *The 'Salina'* [1998] 3 SLR 76; [1998] SGHC 76 (HC) for this proposition.

[50] The plaintiff also submitted that as the plaintiff who was in possession of the bill of lading, the cargo was to be delivered to it as the holder of the bill of lading. In support, the plaintiff referred the court to *Sucre Export SA v Northern Shipping Ltd, The Sormovskiy 3068* [1994] 2 Lloyd's Rep 266, *Barclays Bank Ltd v Commissioners of Customs and Excise* [1963] Lloyd's Rep 81, *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* [1959] 1 MLJ 200, *PT Karya Sumiden Indonesia v Oceanmasters Marine Services Sdn Bhd & Anor* [2016] 7 MLJ 589, *Kuwait Petroleum Corporation v I & D Oil Carriers Ltd (The Houda)* [1994] 2 Lloyd's Rep 541 and *Minmetals South-East Asia Corp Pte Ltd v Nakhoda Logistics Sdn Bhd* [2018] 6 MLJ 152.

[51] The first intervener submitted that the plaintiff does not have a well-founded case as the validity of the bill of lading on which the plaintiff founds its claim against the defendant is in doubt. In Suit 805, plaintiff pleaded that the directors of the defendant caused the defendant to obtain inventory financing improperly by pledging cargo it did not own by overstating the quantity of cargo it did not own and pledging cargo that had already been encumbered. The report of the defendant's interim judicial managers also stated the irregularities of 22 bills of lading. Additionally, the first intervener argued that as the plaintiff holds a fabricated bill of lading, the plaintiff's recourse, if any, should be framed in fraud or the tort of deceit against the defendant (under judicial management).

[52] The first intervener further submitted that the plaintiff's claim cannot be decided based on the affidavit evidence alone and a full trial, with calling of witnesses, is required as a matter of justice. The basis of this submission is that

the plaintiff has not proven that the trade facility and general pledge are valid and enforceable security documents where no opinion on Singapore law on the substantive rights and obligations of the parties under the trade facility and general pledge was not provided and the plaintiff merely makes a bare assertion in its affidavit that 'As a result of defaults under the trade facility, the plaintiff exercised the pledge over the six bills of lading.' to show that a breach of the trade facility has been committed which entitles the plaintiff to exercise its security over the cargo based on the bill of lading.

[53] The first intervener also submitted that the plaintiff has not proven that the bill of lading, which is the substratum of he plaintiff's claim in this action, is valid, binding, and enforceable as this issue is still pending determination by the Singapore High Court in Suit 805. The first intervener also argued that there is no legal opinion that, as a matter of Singapore law, plaintiff has legal or equitable interest in the cargo, or the creation of the security over the cargo by a pledge of the bill of lading, or the enforceability thereof, is not affected or impaired or invalidated by the bill of lading being prima facie false or fabricated instrument.

[54] To persuade the court that the plaintiff's claim should go to trial, counsel for the first intervener further referred me to the case of *Qatar National Bank v Owner of the Yacht Force India* [2020] 2 Lloyds Rep 343 for the proposition that in admiralty in rem default judgments, where the interest of other maritime claimants in the vessel (or proceeds of sale) is at stake, the courts will not give default judgment until the claim is satisfactorily proven. Counsel also referred to *The 'Eternal Peace'* [1985] 1 Lloyd's Rep 136 for the proposition that natural justice demands that, if there is any defence to the plaintiff's claim, a party to the proceedings ought to be allowed to raise it, provided the plaintiff is not prejudiced.

[55] Upon an examination of the affidavit evidence presented by the plaintiff, the plaintiff has established the following facts:

(a) the real defendant that is answerable to the plaintiff's claim is the defendant who was the demise charterer who had possession and control of the vessel;

(b) the defendant was the party that issued the bill of lading who had pledged the bill of lading to the plaintiff as security. The defendant is the party to the general pledge that was signed by the directors of the defendant;

(c) the defendant is the party that obtained from the plaintiff the trade facility which was signed by the directors of the defendant;

(d) the plaintiff has financed the purchase of oil and oil related products by the defendant under the trade facility and as security or collateral for the amounts disbursed by the plaintiff to the defendant under the trade facility, the defendant had pledged the bill of lading to the plaintiff;

(e) the plaintiff is in possession of the original bill of lading; and

(f) the plaintiff sent notice of its claim prior to filing the action to the defendant and the defendant's judicial managers as well as the first intervener qua shipowner and there was no response from the defendant, the defendant's judicial managers or the first intervener on the whereabouts of the cargo covered by the bill of lading in the plaintiff's possession.

[56] In the absence of any factors to challenge the facts above, I would have no hesitation to hold that the plaintiff has proven that its claim for misdelivery of cargo against the defendant, is well-founded and judgment in default ought to be granted to the plaintiff. However, the first intervener has raised the issue that the substratum of the plaintiff's claim, ie, the bill of lading is being called into serious question as the findings of the defendant's and OTPL's interim judicial managers at that time through their investigations have raised questions as to whether the plaintiff is holding a valid original bill of lading for the cargo onboard the vessel. Fabrication of the bill of lading is also an issue in Suit 805.

[57] In response to this challenge, the plaintiff submitted that there is no issue of fraud as the plaintiff, as a bank who provided trade facility which is secured by the general pledge where the defendant had pledged to the plaintiff its interest over the bill of lading was protected from any fraudulent transaction especially when the alleged fabrication or non-authorisation did not come to the notice of the plaintiff when the trade facility was granted to the defendant.

[58] On this issue I was referred to by plaintiff's counsel a passage by Paul Todd in *Maritime Fraud and Piracy* (2nd Ed) where the learned author said at pp 59 and 60:

> 2.036 *Once the courts had accepted the development of the bill of lading as a document title to goods, it was realised that it was possible to pledge the goods for an advance, as well as to sell them.* The provision by buyers of bankers' documentary credits gave the sellers an assurance that they would be paid, against tender of the bill of lading and other required shipping documents, by a reliable and solvent paymaster. The risks of a bankrupt, or indeed fraudulent buyer, were therefore removed from them, and to this extent the documentary credit reduces the vulnerability of the system to fraud. The confirmed credit gave the sellers additional protection, this time against pitfalls of having to litigate abroad.
>
> 2.37 *The bank was also protected against a fraudulent buyer (except against the*

A *consequences of a falling market), as long as it retained the bill of lading against reimbursement by the buyer …*

2.38 Like the cif contract before it, the development of the documentary credit was driven by commercial convenience, while at the same time protecting the trading parties against the risks of dealing someone of uncertain financial status. Just as with
B the cif contract, however, everything depends on the accuracy of statements in a piece of paper, and the efficacy of that paper as a document of title. But there are other considerations with documentary credits, which may make them more vulnerable to fraud. The first is the principle of autonomy. *A bank, unlike a buyer, does not hold itself out as having any knowledge of the goods, or understanding of the underlying transaction. Banks deal in documents which apparently conform. In*
C *accordance with this principle, the law generally reguires bank to accept, and pay against, documents which conform on their face, whatever suspicions may exist as to the underlying state of the goods themselves. Secondly, a 'vendor of goods selling against a confirmed letter of credit is selling under assurance that nothing will prevent him from receiving the price. (Emphasis added)*

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[59] From the passage above by Paul Todd the following points can be extracted:

(a) a bill of lading as a document title to goods can be used to pledge the
E goods for an advance such as a trade facility as in the instant case;

(b) the bank to whom the bill of lading was pledged as security for the advance/trade facility was protected against a fraudulent buyer as long as it retained the bill of lading against reimbursement by the buyer; and

F (c) a bank does not hold itself out as having any knowledge of the goods, or understanding of the underlying transaction.

[60] In arriving at this opinion, the learned author drew some parallels from documentary credits such as letters of credit. Sellers who trade rely on such
G documents expecting to be paid the price of the goods sold when these are presented to banks as long as the documents conform on the face of them. This has to be so for commercial convenience and banks do not need to be concerned with the actual goods or is required to understand the underlying transaction. Commercial convenience requires that sellers are given additional
H protection against pitfalls of having to litigate abroad.

[61] In *Czarnikow-Rionda Sugar Trading Inc v Standard Bank London Ltd and others* [1999] 1 All ER (Comm) 890 the English Court (Queen's Bench Division) when addressing the issue of whether a letter of credit has to be
I complied with in an injunction application when the issue of fraud was raised was of the view that banking commitment should be insulated from disputes between merchants particularly when fraud is alleged. Rix J said this, quoting from Waller J in *Turkiye Is Bankasi AS v Bank of China* [1992] 2 Lloyd's Rep 211:

The context of a final trial on the effect of the fraud exception is comparatively rare. In that context it is interesting to see what Waller J (at 617) had to say about the test of fraud:

> *It is simply not for a bank to make enquiries about the allegations that are being made one side against the other. If one side wishes to establish that a demand is fraudulent it must put the irrefutable evidence in front of the bank. It must not simply make allegations and expect the bank to check whether those allegations are founded or not … [It] is not the role of a bank to examine the merits of allegations … of breach of contract.* To hold otherwise would place banks in a position where they would in effect have to act as Courts in deciding whether to make payment or not. Of course, if a beneficiary were to admit to the bank that it had no right to make the demand, then a totally different situation would arise.'

In the light of these authorities, it seems to me that, even if I assume for the sake of argument that Rlonda has otherwise brought itself within the fraud exception, its claim against Standard for a pre-trial injunction must fail on the balance of convenience alone. I would seek to put the matter in the following way.

(1) The interest in the integrity of banking contracts under which banks make themselves liable on their letters of credit or their guarantees is so great that not even fraud can be allowed to intervene unless the fraud comes to the notice of the bank (a) in time, ie in any event before the beneficiary is paid, and (b) in such a way that it can be said that the bank had knowledge of the fraud. Whether that interest is viewed in terms of the importance that must be attached to the honouring of banking commitments, or in terms of the lifeblood of commerce and in particular international commerce, it has been amply recognised in case after case. Unless the banking commitment can be insulated from disputes between merchants, international trade would become impossible. (Emphasis added.)

[62] The point to be taken from these two authorities is that when a bank provides a trade facility and the customer pledges a bill of lading as security, the bank does not need to go behind the bill of lading to find out whether it was procured by the fraud of the customer. There is thus no issue of fraud in the instant case since the plaintiff as a bank who provided the trade facility which is secured by the general pledge where the defendant had pledged to the plaintiff its interest over the bill of lading was protected from any fraudulent transaction. Therefore, the plaintiff should not be deprived of its judgment in default in its in rem action against the defendant for misdelivery of the cargo carried onboard the vessel under the bill of lading for the value of the cargo when the fabrication of the bill of lading did not come to the notice of the plaintiff when the trade facility was granted to the defendant.

[63] As for the case of *Qatar National Bank v Owner of the Yacht Force India* referred to me by the first intervener for the proposition that there are other maritime claimants the court should not give default judgment until the claim is satisfactorily proven, I find that this authority is not applicable in this instance. This case was not about an application for judgment in default. The

matter was fixed for trial but the defendant was not at the trial. The court declined to strike out the defence and directed the claimant to satisfy the court that it has proven its claim especially since 'Practice Direction to CPR Part 39 contemplates that the claimant must prove its claim where the trial proceeds in the absence of the defendant'. Hence the court stated that it would not be appropriate to grant judgment in default of a defence unless the court was satisfied that the claim had been proved because other parties may have an in rem against the arrested vessel and their interest might therefore be damaged if judgment is given without the claim having been proved.

[64] In any event, other maritime claimants do not object to encl 45. The second intervener and the third intervener do not object and there are no other claimants before the court.

[65] *The 'Eternal Peace'* referred to the court to support the first intervener's natural justice argument, proceeded under a different rules of procedure similar to O 15 r 6(2)(b)(ii) of the Rules of Court 2012 dealing with an application by a bank providing a bail bond to the plaintiff undertaking to pay the plaintiff any amounts due from the owner upon a judgment in the plaintiff's action to be added as a defendant. The bank also applied to set aside the judgment in default of defence and sought leave to defend the action. It is not about an application for judgment in default and is not applicable in this situation.

[66] The plaintiff submitted, and I agree, that a judgment in default granted by this court does not amount to a denial of natural justice as the writ was properly issued and served. The judicial managers of the defendant have notice of the claim and instead of defending the claim opted to bring an action in Suit 805 against the directors of the defendant, who are also the directors of the first intervener.

[67] The present claim by the plaintiff is for damages on account of misdelivery of the cargo without the production of original bill of lading. On the other hand, in Suit 805 the claim by the defendant (under judicial manager) is for fraud or tort of deceit against its directors and shareholders. It is clear to me that the judicial managers of the defendant are not seeking for a declaration that the bill of lading is invalid but are seeking damages against the directors of the defendant in carrying on the business of the defendant with intent to defraud the financial institutions, including the plaintiff, by obtaining the financing facilities. Thus, fabrication of the bill of lading becomes irrelevant. It is also clear from the pleadings in the Suit 805 that the judicial managers have accepted that the defendant is indebted to the financial institutions and are now seeking on behalf of the defendant to recover the

amount owing by the defendant to the financial institutions from the directors personally for causing the defendant to be indebted to the financial institutions.

[68] The plaintiff in Suit 805 pleaded at para 45(b) of the Suit 805 statement of claim:

> (x) In causing the Plaintiff to apply for and obtain inventory financing by inflating the amount of inventory the Plaintiff had, the Lim Family, Lim HC (Lim Huey Ching) and/or Evan Lim (Lim Chee Meng) acted fraudulently and in breach of their duties as directors, and carried on the business of the Plaintiff with intent to defraud the respective financial institutions mentioned above. But for the Lim Family's, Lim HC's and/or Evan Lim's deliberate and fraudulent conduct in inflating the amount of inventory the Plaintiff had, those financial institutions would not have extended the financing that they did, alternatively, not in the amounts that they did.
>
> (xi) In the circumstances, Lim HC is personally responsible for the debt that the Plaintiff still owes arising from the inventory financing facilities specified in sub-paragraphs (i), (ii), (iii), and (vii) above. The amount of this debt as at 27 April 2020 was US$148.0 million.
>
> (xii) In addition, Evan Lim is personally responsible for the debt that the Plaintiff stili owes arising from the inventory financing facilities specified in sub-paragraphs (v), (vi), and (ix) above. The amount of this debt as at 27 April 2020 was US$84.7 million.
>
> (xiii) In addition, the Lim Family are personally responsible for the debt that the Plaintiff still owes arising from the inventory financing facilities specified in sub-paragraphs (iv) and (viii) above. The amount of this debt as at 27 April 2020 was US$99.7 million.

[69] Further, the plaintiff pleaded at para 45(c) of the Suit 805 statement of claim:

> (i) In the circumstances, Lim HC is personally responsible for the debt that the Plaintiff still owes arising from the inventory financing facilities specified in the table above. The amount of this debt as at 27 April 2020 was US$79.2 million.
>
> (ii) In addition, Evan Lim is personally responsible for the debt that the Plaintiff still owes arising from the inventory financing facilities specified in the table above. The amount of this debt as at 27 April 2020 was US$25.0 million.
>
> (iii) In addition, the Lim Family are personally responsible for the debt that the Plaintiff still owes arising from the inventory financing facilities specified in the table above. The amount of this debt as at 27 April 2020 was US$68.9 million.'

[70] From the beginning, the plaintiff's pre-action letters dated 11 April 2020 and 21 April 2020 were not responded to and no appearance in respect of this action was filed by the judicial managers on behalf of the defendant. The judicial managers are clearly not interested in defending any claims from the plaintiff as any amount that the defendant is found to be liable to the plaintiff are being recovered from the defendant directors.

[71] There is no useful purpose in going to trial when the defendant (under judicial management) will not be contesting the plaintiff's claim. The first intervener has already been excluded from setting up a defence available to the defendant by virtue of encl 51 being allowed. The plaintiff's claim based on the evidence before the court will remain intact without challenge at the trial.

[72] In any event, the interim findings by the defendant's interim judicial managers are unconfirmed. These are not final and are subject to further investigations. Thus they cannot be relied on. Further, the first intervener only repeats suspicions and allegations as pleaded in Suit 805 to advance its claim that the bill of lading is fabricated and not authorised as a reason to defeat encl 45. This is not allowed as the pleadings in the Suit 805 statement of claim are not evidence. See *Ng Ben Thong & Ors v Krishnan a/l Arumugam* [1998] 5 MLJ 579 (HC) and *Mohd Syamsul bin Md Yusof & Ors v Elias bin Idris* [2019] 4 MLJ 788 (FC).

CONCLUSION

[73] Considering the totality of the facts and circumstances of the case as disclosed in the affidavit evidence, it was quite clear to me that the plaintiff had clearly shown that the first intervener is not entitled to plead or set up any defence available to the defendant due to its lack of locus standi as decided in *The Lord Strathcona* and *The 'Brihope'*. The plaintiff has also shown to the court that it has a well-founded case for it to obtain judgment in default of appearance against the defendant in line with the principle stated in *The Fordeco Nos 12 And 17*. Accordingly encl 51 and encl 45 are allowed.

Enclosures 45 and 51 allowed with costs.

Reported by Muhamad Azham Marwan